In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1523

AMERICO MOSCA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1962, petitioner was granted a patent for a chemical fungicide, which has not yet been made, used, sold or distributed within the United States. In order to market a pesticide within the United States, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135-135k, requires that its labels be registered with the United States Department of Agriculture. Under the Food, Drug and Cosmetic Act, 21 U.S.C. 301-392 and accompanying regulations, 7 C.F.R. 363 *et seq.*, any pesticide chemical which is

not generally recognized by qualified experts as safe for sale when added to a raw agricultural commodity shall be deemed unsafe and therefore not entitled to registration, unless the pesticide is determined to be within an allowed tolerance or exempted by the Secretary of Health, Education and Welfare, 21 U.S.C. 346a(a); 7 C.F.R. 363.11. Further, the marketing of a fungicide requires a certificate of usefulness from the Secretary of Agriculture, the certificate to be issued after submission of detailed reports of the product's effectiveness. 21 U.S.C. 346a(a) and 346a(*l*).

In 1966, petitioner submitted an application for registration of his fungicide to the Department of Agriculture and requested a tolerance from the Department of Health, Education and Welfare. Both of petitioner's applications have been continually denied. In 1968, petitioner brought the present suit in the Court of Claims, arguing essentially that the issuance of a patent presumes the safety of the patented product, and thereby supercedes the above-mentioned statutes and regulations. Petitioner charged that the application of these regulations voided his patent and resulted in an unlawful taking of his property without just compensation. The Court of Claims rejected petitioner's contentions.

The Court of Claims correctly dismissed the suit. This Court has long recognized that "the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee." *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 463; *Special Equipment Co.* v.

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Coe, 324 U.S. 370, 378. The grant of a patent does not exempt the patentee from compliance with other laws or regulations. *United Shoe Machinery Corp.* v. *United States*, *supra*, at 463. The application to petitioner of the requirements governing the marketing of pesticides did not void his rights as a patentee, and there is no allegation of infringement through use by others.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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